

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v

File No. 09-27644-AR
HON. PHILIP E. RODGERS, JR.

MICHAEL THUE,

Defendant/Appellee.

John R. Bertino (P69150)
Attorney for the Plaintiff/Appellant

Jeffrey A. Slocombe (P44704)
Attorney for the Defendant/Appellee

DECISION AND ORDER ON APPEAL

On November 9, 2009 the People of the State of Michigan filed an Application for Leave to File Interlocutory Appeal with this Court pursuant to MCR 7.103(A). The Application pertained to a decision entered November 3, 2009 by the Honorable Michael J. Haley in the 86th District Court. Judge Haley's decision affirmed his June 23, 2009 ruling granting the Defendant/Appellee's Motion to Dismiss/Suppress. On December 7, 2009 this Court granted Plaintiff/Appellant's Application for Leave to File Interlocutory Appeal and subsequently established a briefing schedule for the parties. The parties have timely submitted their briefs on appeal and the undisputed facts are as follows.

STATEMENT OF FACTS

On May 19, 2009 the Defendant/Appellee Michael Eugene Thue was stopped by Grand Traverse Sheriff's Deputy Travis Horn for failing to wear a seat belt while driving. When Deputy Horn approached the driver's side of the vehicle, he testified that he detected a slight odor of unburned marijuana emanating from Thue's vehicle and observed what appeared to be drug paraphernalia located on the dashboard. Thue presented Deputy Horn with a Michigan

medical marijuana card and one rolled marijuana cigarette.¹ After confirming that Thue was on parole, Deputy Horn contacted Thue's parole officer Tom Chapman. Mr. Chapman advised Deputy Horn that Thue was in violation of his parole for possessing marijuana and requested that Thue be taken into custody and arrested. Deputy Horn then informed Thue that he was in violation of his parole and under arrest.

After Thue was placed in the rear passenger seat of Deputy Horn's patrol vehicle, the Deputy had his canine partner search the exterior of Thue's vehicle to determine whether narcotics were present. During the exterior search of the vehicle, the canine twice indicated the presence of narcotics. Deputy Horn proceeded to search the interior of Thue's vehicle where he found additional marijuana, some drug paraphernalia and a black case containing a switchblade knife.

Throughout both the exterior and interior search of the vehicle, Thue was detained, in custody and without access to his vehicle.

PROCEDURAL BACKGROUND

The Defendant/Appellee was charged with Weapons-Switchblade-Possession or Sale, contrary to MCL 750.226a. He was not charged with a controlled substance offense.

The Defendant/Appellee filed a motion to suppress the evidence seized by Deputy Horn. He claimed that the search of his vehicle violated his Fourth Amendment right to be free from unreasonable search and seizure. The District Court found that the warrantless search was unreasonable under the Fourth Amendment, granted the motion and suppressed the evidence.

The People filed an appeal as of right. Three days later, the People requested a stay of the proceedings in the District Court. Before the District Court decided whether to stay the proceedings, the People moved to dismiss the action. A final order of *nolle prosequi* was entered on July 15, 2009 and the case was dismissed.

On July 29, 2009 the Defendant/Appellee filed a motion to dismiss with the Circuit Court which was subsequently granted on September 3, 2009. On September 10, 2009 the People filed a Complaint in District Court charging the Defendant/Appellee with Weapons-Switchblade-Possession or Sale under MCL 750.226a. Defendant/Appellee filed a Motion to

¹ According to MCL §333.26421 et seq., the Michigan Medical Marihuana Act, the controlled substance or drug is referred to and spelled "marihuana," however, this Order substitutes "marijuana" to correspond with the prior case pleadings and transcripts.

Suppress and/or Dismiss on October 3, 2009 which was heard and granted on November 3, 2009 by the Honorable Michael J. Haley. Further, Judge Haley ordered that the matter be stayed in District Court pending appeal.

ISSUE

The issue on appeal is whether Deputy Horn's search of the vehicle violated the Defendant/Appellee's Fourth Amendment right to be free from unreasonable search and seizure. The Court now issues this decision and order affirming the District Court's ruling to grant the Defendant/Appellee's motion to suppress.

STANDARD OF REVIEW

The application of the exclusionary rule to a violation of the Fourth Amendment is a question of law. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001). The standard of review is de novo with regard to questions of law. *People v Sierb*, 456 Mich 519, 521-522; 581 NW2d 219 (1998).

ANALYSIS

The constitutional right to privacy is enforceable against the states through the Due Process Clause of the Fourteenth Amendment and requires that evidence illegally seized be excluded from use in a criminal prosecution. *Mapp v Ohio*, 367 US 643; 81 S Ct 1684 (1961). It is generally held that warrantless searches "conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v United States*, 389 US 347, 357; 88 S Ct 507 (1967). In *Chimel v California*,² the Supreme Court established a rule requiring that a search incident to arrest be limited to the space within an arrestee's immediate control and further, must be justified either by the interest in officer safety or the interest in preserving evidence from tampering or destruction. This warrant exception was elaborated in *New York v Belton*,³ which held that once an occupant in an automobile has been arrested and removed from the vehicle, law enforcement officers are permitted to search the passenger compartment of the automobile, including the glove compartment and all open or

² *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969).

³ *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981).

closed containers found in the passenger compartment, incident to the arrest.⁴ Finally, *Thornton v United States*⁵ extended the *Belton* rule, suggesting that additional justification for an evidentiary search is present when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

However, in the recent case of *Arizona v Gant*⁶ the Supreme Court reassessed the holding in *Belton*. The Court expressed that in the time since *Belton* was decided, this particular warrant exception has been unconstitutionally expanded and employed under tenuous circumstances. *Arizona, supra* at 1723. The Court found that “blind adherence to *Belton*’s faulty assumption would authorize myriad unconstitutional searches” and noted, “[A] broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests . . . ‘[The] mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.’”⁷ *Id.*, at 1721-1723. Thus, the Court adopted a narrower version of the rule, holding:

Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest*. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Id.*, at 1723-1724. [Emphasis added.]

In *United States v Lopez*,⁸ the defendant/appellant was arrested for reckless driving. After he was secured in the back of the patrol car, the arresting officer searched the passenger area of defendant’s vehicle and found narcotics, drug paraphernalia and a loaded handgun. The defendant appealed the district court’s denial of his motion to suppress, claiming that the police violated his Fourth Amendment rights by searching his vehicle when he was already secured in the back seat of the patrol car. *Lopez, supra* at 757. The court then applied the new search incident to arrest law established in *Arizona v Gant*, finding that because the defendant

⁴ See also *People v Ragland*, 149 Mich App 277, 281; 385 NW 2d 772 (1986); *People v Waddell*, 132 Mich App 171, 172-173; 347 NW 2d 13 (1984).

⁵ *Thornton v United States*, 541 US 615, 632; 124 S Ct 2127; 158 L Ed 2d 905 (2004).

⁶ *Arizona v Gant*, 556 US ____; 129 S Ct 1710; 173 L Ed 2d 485; 77 USLW 4285; 09 Cal Daily Op Serv 4732; 2009 Daily Journal DAR 5611; 21 Fla L Weekly Fed S 781 (2009).

⁷ Quoting *Mincey v Arizona*, 437 US 385, 393; 98 S Ct 2408; 57 L Ed 2d 290 (1978).

⁸ *United States v Lopez*, 567 F 3d 755 (2009).

was handcuffed in the patrol car and was not within reaching distance of his vehicle's passenger compartment during the search, the standard for a warrantless search was not met. *Lopez, supra* at 757-758. Further, the court noted that there was no reason to think that the vehicle contained evidence of the offense of arrest since the defendant was arrested for reckless driving and not possession of drugs and carrying a firearm. *Id.*

In the instant case, the Plaintiff/Appellant maintains that Deputy Horn made a lawful search of the Defendant/Appellee's vehicle incident to Defendant/Appellee's arrest. The Defendant/Appellee, counters that the search violated his Fourth Amendment right to be free from an unreasonable search and seizure.

The controversy here relates to whether the search was conducted because it was "reasonable to believe that . . . the vehicle contained evidence of the offense of the arrest." *Arizona, supra* at 1714. The Plaintiff/Appellant argues that Deputy Horn smelled marijuana in the vehicle and confiscated marijuana that was voluntarily produced by the Defendant/Appellee. Upon speaking with Defendant/Appellee's parole officer, Deputy Horn was informed that Defendant/Appellee was in violation of his parole by possessing marijuana. The Deputy took Defendant/Appellee into custody and detained him in the back of his patrol car.

Since Deputy Horn could not confirm the 'marijuana' provided by the Defendant/Appellee was in fact marijuana, he decided to search the exterior of the car with his canine partner to establish probable cause to suspect additional narcotics. Once the dog indicated the presence of narcotics inside the vehicle, the Deputy had reason to believe that the vehicle contained evidence of the 'offense of the arrest.' The Plaintiff/Appellant contends that possession of marijuana caused the violation of Defendant/Appellee's parole and was incidental to his arrest. Therefore, Deputy Horn had probable cause to search the vehicle for evidence of the offense of the arrest and, because said search was a valid exception to the warrant requirement, the switchblade that was found should not be suppressed as evidence.

The Defendant/Appellee, on the other hand, argues that he was not arrested for committing an "offense," but instead was arrested for violation of his parole.⁹ Thus, applying the ruling in *Arizona*, the circumstances required to justify a warrantless search of

⁹ However, since this parolee cannot lawfully possess the controlled substance marijuana, his behavior was a parole violation and a criminal misdemeanor.

Defendant/Appellee's vehicle were not present, the search was unlawful and the evidence of the search must be suppressed. *Arizona, supra*.

In *People v Bendon*,¹⁰ a condition of the defendant's parole prohibited him from entering the city of Detroit. The defendant was arrested by a police officer as a parole violator because the officer believed the defendant was violating the conditions of his parole by being in Detroit. The search incident to defendant's arrest revealed that he was in possession of a firearm. He was charged with carrying a concealed weapon, tried, convicted, and sentenced to prison to serve time for his former sentence and his new sentence. At the time of his arrest, the defendant had in his possession and provided the officer with a certificate granting him permission to spend the holidays with his sister in Detroit. Thus, the defendant was not violating his parole or committing an offense by being in Detroit.

Claiming his arrest and the search were unlawful, the defendant moved the court to suppress the evidence found on him. The motion was denied, but the Supreme Court reversed. The Supreme Court found that the defendant, while on parole, was statutorily serving his sentence, remained in the legal custody and under the control of the prison warden and was subject to re-imprisonment for any reason satisfactory to the warden. Since the warden had not authorized defendant's arrest, the defendant was not violating his parole by being in Detroit and he had not committed a crime, the police had no right to arrest him. Therefore, the arrest was unlawful, the search unconstitutional and the evidence of the search should have been suppressed.

The holding in *Bendon* is inapposite here. In the instant case, the Defendant/Appellee was also on parole and could not lawfully possess marijuana. By statute, he was serving his sentence and remained in the legal custody and under the control of the Department of Corrections. Although the Defendant/Appellee was a registered medical marijuana patient pursuant to the Michigan Medical Marijuana Act, his parole status and its applicable conditions prevented him from lawfully possessing marijuana.¹¹ Accordingly, the Defendant/Appellee was *lawfully* arrested on a parole violation as authorized by his parole officer, Thomas Chapman. While MCL §333.26421 *et seq.* grants certain persons permission to possess marijuana, it does not supersede federal law or lawful state parole conditions. Thus,

¹⁰ *People v Bendon*, 263 Mich 295; 248 NW 627 (1933).

¹¹ Michigan Medical Marijuana Act, MCL §333.26421 *et seq.*

his possession was a criminal offense and the Deputy had authority to arrest him solely based on his possession of the narcotics. Because the arrest was lawful and the subsequent search was constitutional, the additional narcotics and switchblade found in the vehicle should not have been suppressed.

The Defendant/Appellee was arrested for violating his parole by possessing a controlled substance. If the Defendant/Appellee's parole conditions had not specifically prohibited his possession of marijuana, the Defendant/Appellee's possession would still have violated federal law and any violation of law subjects him to a lawful arrest. Under these circumstances, Deputy Horn had justification to believe that the vehicle contained "evidence of the offense of the arrest." Therefore, under *Arizona, supra*, the search was lawful and the trial court erred in suppressing the evidence of the warrantless search and seizure.

CONCLUSION

For the reasons stated herein, this Court reverses the trial court's ruling to suppress the evidence discovered during the search of the Defendant/Appellee's vehicle. The Defendant/Appellee was arrested for the commission of a misdemeanor, which was a violation of his parole conditions. Therefore, the search was lawful because the Deputy had reason to believe that the vehicle contained evidence of the offense of the arrest and a warrant exception existed.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

4/23/10